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Federalisation Versus Centralisation: Tensions in Fundamental Rights Discourse in the EU

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I. Introduction

The debate about fundamental rights in the European Union does not concern so much the identification of the values which should be considered at the very heart of our conception of humanity. After all, those values were identified in 1950 in the European Convention of Human Rights. Rather, the debate revolves around the identification of the *locus*, supranational or domestic, where it is appropriate to carry out the balancing exercise between these conflicting values; and also, on the identification of the institution, judicial or political, which should carry out such balancing exercise. This balancing exercise normally reflects deeply held societal preferences as to the respective strengths of the values enshrined in fundamental rights documents. In this respect, the Member States' acceptance to defer the balancing exercise, as a last resort, to the European Court of Human Rights was based on the assumption that the European Convention of Human Rights would represent a floor of rights; such a minimalist conception allowed the balance to oscillate considerably between different assessments of the respective force of conflicting values. In this way, the Convention, as interpreted by the European Court of Human Rights, served the double purpose of respecting the plurality of societal choices that characterises different polities, while at the same time enforcing a minimum level of protection which itself reacts to changes in social perception. As complex as the creation of an international human rights discourse might be, then, it is considerably simpler than its supranational counterpart. In the international sphere, there is no ambition to harmonise the fundamental rights discourse beyond what is required by the minimum floor of protection. In the supranational sphere, on the other hand, and as we shall see in more detail below, the emergence of a fundamental rights discourse

might require the imposition of a sole standard (sometimes lower and sometimes higher than the national counterpart) in the protection of fundamental rights.

In this sense, the fundamental rights discourse in the European Union reflects the evolution of, and the tensions inherent in, the Union's constitutional process. In particular, the debate about fundamental rights protection mirrors the tension between federalisation and centralisation, and the deep worries which we have seen expressed in relation to the recent constitutional process. At both political and judicial level, there are in fact two conflicting forces, centripetal and centrifugal, in relation to fundamental rights protection. The centripetal force attracts the fundamental rights discourse within the European Union project, first as an ancillary goal and then—more and more—as an aim in itself.¹ The centrifugal force, by contrast, seeks to pull away fundamental rights from the EU gravitational orbit.² The centripetal force reflects the development of the European Union in a more mature and comprehensive constitutional system, a system that has long stepped outside the confines of the internal market. The centrifugal force, on the other hand, reflects the desire to maintain a diversified and multifaceted constitutional system, where national sovereignty is seen as the source of the Union's own constitutional legitimacy.

This contribution seeks to explore these dynamics; in particular, it will be argued that if the fundamental rights discourse aims to serve a legitimising function, it must reflect these tensions and acknowledge that centralisation of fundamental rights is not always the answer. We will start by a short historical introduction of the development of fundamental rights discourse in the European Union, and then focus on the two forces at play, the centralising and the federalising force, in the case law of the European Court of Justice.

* Reader in Law, Durham University. I am grateful to the participants to the Liverpool conference on *50 Years of the European Treaties* for a very fruitful discussion. I am indebted to Lorenzo Zucca and Michael Dougan for their comments on an earlier draft. The usual disclaimer applies.

¹ Eg the Treaty amendments and the proclamation of the Charter of Fundamental Rights, both discussed below.

² Eg the limited scope of the Charter of Fundamental Rights and the limited mandate of the EU Fundamental Rights Agency: see n 15 below.

II. The Development of Fundamental Rights in the EU: A Historical Introduction

As is well known, the original Treaty of Rome did not contain any reference to fundamental rights; but this lacuna in the Treaties was soon filled by means of judicial interpretation. Thus, the European Court of Justice held that fundamental rights formed part of the general (unwritten) principles of Community law which bound the European institutions.³ While we shall examine in the next sections the extent to which fundamental rights as general principles of Community law bind the Member States, the decision to include fundamental rights in the general principles of law which the European institutions must respect is, and was, not particularly controversial. Rather, it is unthinkable that either the national or the Community judiciary would have allowed the Member States to derogate, by means of an action at Community level, from that minimum floor of rights that they themselves had signed up to in the European Convention of Human Rights (not to speak about their national constitutions).⁴ And indeed, a few years after the *Internationale Handelsgesellschaft* ruling,⁵ the Council, the Commission and the European Parliament issued a joint declaration endorsing the case law of the court and committing themselves to respecting fundamental rights as general principles of

³ Case 29/69, *Stauder v City of Ulm* [1969] ECR 419; Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125; and Case 4/73, *Nold v Commission* [1974] ECR 491.

⁴ The court has been accused of having been forced into this step by recalcitrant national constitutional courts, since in the earlier cases, it had failed to recognise fundamental rights: see Case 1/58, *Stork v High Authority* [1959] ECR 17, 26; Joined Cases 36–40/59, *Geitling v High Authority* [1960] ECR 425; and to a certain extent Case 40/64, *Sgarlata v Commission* [1965] ECR 215. However, the present writer does not share this criticism and believes that the way in which the questions had been phrased in these cases, referring to national constitutional rights, determined the ECJ's response. In Case 29/69, above n 3, the reference was phrased in relation to the general principles of *Community* law and the court's answer was positive.

⁵ Case 11/70, above n 3.

Community law.⁶ Thereinafter, each Treaty revision included a fundamental rights ‘element’. The preamble to the Single European Act referred to the Member States’ determination ‘to promote democracy’ on the basis of fundamental rights as recognised in national constitutions and in the ECHR; the Treaty of Maastricht included an express obligation for the European Union to respect fundamental rights,⁷ while the Treaty of Amsterdam introduced a mechanism to ‘suspend’ a Member State in the case of a serious and persistent breach of fundamental rights.⁸ The Treaty of Nice established the Council’s power to make recommendations to a Member State in the event of a clear risk of a serious breach of fundamental rights,⁹ as well as providing the occasion for the institutions’ joint proclamation of the Charter of Fundamental Rights.¹⁰ And finally, the Treaty of Lisbon would give full legal effect to the Charter, as well as provide for the Union’s competence to accede to the European Convention of Human Rights.¹¹

The developments herein mentioned by no means exhaust the Union’s activity in relation to fundamental rights protection.¹² Rather, they have been recalled for three reasons: first, because they constitute the expression at the highest political level of the emergence of a fundamental rights discourse in the Union’s political and legal rhetoric; secondly, they illustrate well the dual dimension of such rhetoric, which seeks to impact on the European *and* on the national discourse; thirdly, they highlight the gradual process of transformation of the fundamental rights rhetoric from a political discourse to a legal one.

⁶ Joint Declaration by the European Parliament, the Council and the Commission concerning the protection of fundamental rights and the European Convention for the protection of human rights and fundamental freedoms [1977] OJ C103/1.

⁷ Art F TEU (Maastricht).

⁸ Art 7 TEU (Amsterdam).

⁹ Art 7 TEU (Nice).

¹⁰ [2000] OJ C364/1.

¹¹ Art 6 of the revised TEU (see consolidated version published at [2008] OJ C115).

¹² Eg the establishment of the European Human Rights Agency; Art 13 EC granting competence to fight discrimination on grounds other than nationality.

This process, then, can be seen from a historical perspective as one of the most tangible effects of the constitutional development of the European project. Even leaving aside the earlier reactions to the court's case law, it is clear that the inclusion of what is currently Article 6 TEU in the Maastricht Treaty was deemed necessary to complement (and maybe to legitimise and support) the expansion of the European Communities'/Union's activities so as to include the Common Foreign and Security Policy and what was then Justice and Home Affairs. However, it should be noted that, while there cannot be any doubt that the obligations in the current Article 6 TEU were, and are, legally binding, the Treaty drafters excluded the jurisdiction of the court. Therefore, the provision was of little direct relevance for citizens, who could not rely on it to challenge the acts of the institutions in the sphere of the second and third pillar. The impossibility of enforcing Article 6 TEU was, of course, a side effect of the very nature of Union competence in these fields: since Union acts needed implementation in national law in order to produce legal effects beyond the sphere of international law, the enforcement of fundamental rights could be guaranteed by means of national law. Thus, the importance of Article 6 TEU has never been merely symbolic: in creating a clear obligation for the Union institutions, it could arguably inform the interpretation and application of national legislation adopted to implement Union acts.

Moreover, the centrality of the values enshrined in Article 6 TEU for the Union project is later reinforced: the Treaty of Amsterdam extended the jurisdiction of the court to the so-called third pillar (albeit on a voluntary basis); and made respect of Article 6 TEU both a precondition for accession to the Union, and the precondition for the full exercise of the prerogatives of Union membership. Thus, while the possibility of suspending voting rights for breaches of fundamental rights provided in Article 7 TEU can be cynically seen as a piece of empty rhetoric,¹³ which is there to

¹³ Eg the failure to use the Art 7 TEU procedure against Italy in relation to the excessive concentration of the media in the hands of Mr Berlusconi during his periods as prime minister: see generally, R Crauford-Smith, 'Rethinking European Union competence in the field of media ownership: the internal market, fundamental rights and European citizenship' (2004) 29 *EL Rev* 652 and references therein included. Also, the debate about the fingerprinting of Roma families in Italy (see Plenary session of the European Parliament, 8 July 2008).

embellish the Union more than to ensure that a minimum standard of fundamental rights protection is maintained throughout the 27 Member States, its symbolic value cannot be underestimated. The effect of Article 7 TEU is to create a revolving door which links a ‘bottom up’ approach with a ‘top down’ approach. If fundamental rights as general principles of Union law are a by-product of national constitutional traditions, such general principles might bounce back in national law, so that any systematic derogation from those principles could, at least potentially, give rise to a reaction at the Union level. Even though the threshold for triggering the suspension mechanism is very high and the mechanism is politically extremely sensitive, its existence is significant in that it links the national and the Union fundamental rights discourses. In this sense, it could be argued that Article 7 TEU might help to legitimise the court’s enforcement of the general principles against Member States (which shall be examined in detail in the next section).

Finally, the gradual but constant evolution of the fundamental rights rhetoric from political to legal discourse again highlights the centrality of such rhetoric in legitimising the expansion of Union competences. Thus, the very idea of drafting a Charter of Fundamental Rights was also due to the need to provide greater legitimacy for the Union’s action both in the field of foreign policy and in the field of cooperation in criminal matters. In relation to foreign policy, it was felt that a Union Charter of Fundamental Rights might help to provide legitimacy for the increased frequency in the use of human rights conditionality clauses.¹⁴ As for cooperation in criminal matters, it is obvious that the existence of a clear catalogue of rights might reinforce not only the legitimacy of action taken in such a delicate field, but also the guarantees for individuals.

These progresses and their significance should not therefore be underestimated. And yet, the most important force behind the development of fundamental rights in the European Union is, unsurprisingly, the European Court of Justice. In this respect, while the political institutions attempted to safeguard an element of national

¹⁴ On the possible reasons that might have created the momentum for the decision to draft a Charter of Fundamental Rights, see E Paciotti, ‘La Carta: i contenuti e gli autori’ in A Manzella, P Melograni, E Paciotti and S Rodotà, *Riscrivere i diritti in Europa* (Il Mulino, Bologna, 2001).

sovereignty over fundamental rights protection,¹⁵ the case law, especially in the past 10 years, has seen strong centralising elements.

III. Conflicting Forces in the Case Law of the ECJ: Centralisation Versus Federalisation

We have mentioned above that, in the early 1970s, the court held that the European Communities were bound by fundamental rights as general principles of Community law.¹⁶ As we have said, this step was not particularly controversial: it is natural that the benchmark for the European institutions should be that set by the European Court of Justice with reference to the general principles of Community law.

More controversial, however, is the decision to extend the application of fundamental rights as general principles of Community law to acts of the Member States. This step was first taken in relation to domestic acts which are adopted with a view to implementing a Community act.¹⁷ The reasoning behind this intrusion in the national fundamental rights arena is simple enough. When the Member State implements Community law, it is acting as an ‘agent’ of the Community, and as such it cannot breach those rights which bind the Community legislature.¹⁸ Furthermore, it is likely that this principle applies also in relation to framework decisions adopted pursuant to

¹⁵ Eg the Charter applies to the Member States only when they *implement* EU law, and not when they act within the field of EU law; the European Human Rights Agency [2007] OJ L53/1 is only concerned with Member States when they implement Community law, and has only ‘reporting’ powers.

¹⁶ Case 29/69, above n 3; and more clearly Case 11/70, above n 3.

¹⁷ Case 5/88, *Wachauf* [1989] ECR 2609; Joined Cases C-20 & 64/00, *Booker Aquaculture Ltd v Scottish Ministers* [2003] ECR I-7411; it should be noted that a link between free movement and fundamental rights had already been established in Case 36/75, *Rutili v Minister for the Interior* [1975] ECR 1219.

¹⁸ On the confusion as to the extent of this obligation, see A Arnall, A Dashwood, M Dougan, M Ross, E Spaventa and D Wyatt, *Wyatt and Dashwood’s EU Law*, 5th edn (London, Sweet & Maxwell, 2006), 267–8.

Title VI TEU (the third pillar),¹⁹ although the extent to which fundamental rights might become directly effective through the medium of Union law is open to debate.²⁰

In any event, in relation to acts of the Member States implementing Community/Union law, when there is a different standard between domestic and Community fundamental rights, and provided the Member State is exercising some discretion, the highest standard should prevail. Where it is impossible to determine whether the national or Community standard is higher, for instance because the matter involves the balancing of conflicting rights, then the Community standard should apply and the ultimate arbiter would be the European Court of Justice. This approach has been codified in the Charter, which applies only to the acts of the Union institutions and to the acts of the Member States when they implement Union law.²¹

A. The *ERT* and *Familiapress* Case Law: Balancing Centralisation and Federalisation

A more problematic step is that of extending the application of fundamental rights as general principles of Community law to the actions of the Member States whenever the matter falls within the scope of Community law, and in particular, when the Member State is limiting one of the free movement rights. This case law originated with the *ERT* decision.²² There, the court held that, when a Member State relies on the Treaty to justify a derogation from one of the free movement rights, it has to respect

¹⁹ Case C-105/03, *Pupino* [2005] ECR I-5285.

²⁰ On this point, see E Spaventa, 'Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Ruling in *Pupino*' (2007) 3 *European Constitutional Law Review* 5; and 'Remembrance of Principles Lost: on Fundamental Rights, the Third Pillar and the Scope of Union Law' (2006) 24 *Yearbook of European Law* 153.

²¹ Art 51 of the Charter of Fundamental Rights of the European Union [2007] OJ C303/1.

²² Case C-260/89, *Elliniki Radiophonia Tileorassi AE (ERT) v Dimotiki Étairia Pliroforissis (DEP)* [1991] ECR I-2925.

fundamental rights as a matter of Community law. In *Familiapress*,²³ the same reasoning applied to situations in which the Member State is limiting (rather than derogating from) the free movement rights and is therefore relying on the mandatory requirements doctrine. Furthermore, it now appears that this case law should apply in the same way also to situations concerning limitations to one of the rights associated with Union citizenship.²⁴

There are two concurring reasons why the extension of the field of application of the general principles of Community law is debatable. First of all, the effect of such case law is to render fundamental rights as general principles of Community law directly effective in the national system. In this respect, consider that fundamental rights scrutiny and the power to strike down conflicting legislation, when at all available,²⁵ is usually reserved to specialised or higher courts. However, through the medium of Community law, any national court or tribunal acquires the power and the duty to scrutinise those rules which are deemed to fall within the scope of Community law as to their compatibility with fundamental rights.²⁶ Secondly, the constant extension of

²³ Case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689.

²⁴ Arts 17 ff EC. There is no ruling on this specific point as yet. However, in Case C-413/99, *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091, the court applied the ‘general principle of proportionality to limitations to the right of residence’, and there is therefore no reason why other general principles, including fundamental rights, should not be applicable. On this point, see M Dougan and E Spaventa, ‘Educating Rudy and the (non-)English Patient: A Double-Bill on Residency Rights under Article 18 EC’ (2003) 28 *EL Rev* 699. See also Case C-300/04, *Eman and Sevinger* [2006] ECR I-8055, which is on the principle of equality, but should apply a fortiori to all fundamental rights. In relation to deportation and the public policy derogation, the court has already had the chance to uphold its fundamental rights jurisprudence also in relation to Union citizenship: see Joined Cases C-482 & 493/01, *Orfanopoulos and Olivieri* [2004] ECR I-5257.

²⁵ In the UK there is no such power; rather according to s 4 of the Human Rights Act 1998, the national courts can only make a declaration of incompatibility which triggers an accelerated procedure for amendment of the legislation at stake (s 10). The European Court of Human Rights has declared such a remedy (for the time being) not effective: see, eg *Burden v UK* (Application no 13378/05).

²⁶ On this point, see E Spaventa, ‘Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects’ (2008) 44 *CML Rev* 13.

the scope of the Treaty, and the uncertain boundaries of the free movement provisions, render the *ERT/Familiapress* case law of pervasive constitutional impact.

And yet, the interpretation of the court is entirely consistent with its premises. Indeed, it would seem peculiar if the Member State could legitimately invoke a Treaty derogation or justify a limitation to a free movement right if, in doing so, it breached not only the right to move of the claimant but also her fundamental rights. And even should one not adhere to Mr Jacobs' opinion that all migrant citizens should be reassured that moving will never entail a loss in fundamental rights protection,²⁷ one can well justify the court's interpretation. After all, the hermeneutic principle driving the fundamental rights jurisprudence is exactly the same as that driving the proportionality assessment: limitations to the right to move must be proportionate because proportionality is a general principle of Union law. It would then be strange if proportionality were the only general principle to apply to such limitations. Therefore, the misgivings one could have about the court's case law might really be with its extensive interpretation of what constitutes a barrier to movement: it is that interpretation which causes what, to some, might seem as undue interference with national autonomy in setting the fundamental rights standards in the domestic arena.²⁸

Furthermore, it should be noticed that the centralising approach inherent in this case law is tamed, in both *ERT* and *Familiapress*, by the fact (first) that the assessment as to the balance between conflicting interests is left to the national court and (secondly) that, in any event, the Treaty rights are used to enhance the protection of fundamental rights and not to interfere with it. As a result, the standard of fundamental rights protection should again always be the highest between the national and Community law standards.

B. The Second Line of Case Law: Towards a More Centralising Approach

²⁷ Opinion in Case C-168/91, *Konstantinidis v Stadt Altensteig, Standesamt und Landratsamt Calw, Ordnungsamt* [1993] ECR I-1191.

²⁸ On this point, see E Spaventa, above n 26.

However, in a second stage, the court seems eager to assess for itself the correct balance to be struck between competing interests when there is a Community element involved. The more interventionist approach is visible, for instance, in *Carpenter*,²⁹ where the assessment of the fundamental rights element appears to be predominant. Interventionism is also apparent in those cases where the court instructs the national referring court to take into due account the fundamental rights of the claimant, even though it itself found no evidence of the existence of a barrier to intra-Community movement capable of bringing the matter within the scope of Community law.³⁰

The more proactive approach towards fundamental rights protection, which might well reflect a change in the court's perception of its own role, is visible also in the case of *Ferstersen*.³¹ There, rather unusually as well as unnecessarily, the court referred to the European Convention on Human Rights in scrutinising a residence requirement. In the case at issue, the question related to the compatibility with Community law of a requirement that those who purchased agricultural property took up fixed residence in the property. As is well known, a residence requirement always constitutes indirect discrimination³²; as such it not only falls within the scope of the Treaty, but it is also difficult to justify, since territorial requirements go against the very idea of the freedom to move freely granted by Community law.³³ One could have well imagined then that any reference to Article 2 Protocol 4 ECHR on the right to move would be wholly unnecessary. This is especially the case since the right to

²⁹ Case C-60/00, *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.

³⁰ Case C-109/01, *Secretary of State for the Home Department v H Akrich* [2003] ECR I-9607. For an attempt to justify the requirement of a fundamental rights review, see E Spaventa, Annotation of *Akrich* (2005) 42 *CML Rev* 225; Case C-71/02, *H Karner Industrie-Auktionen GmbH v Triistwijk Gesmbj* [2004] ECR I-3025; and F De Cecco, 'Room to Move? Minimum Harmonization and Fundamental Rights' (2006) 43 *CML Rev* 9.

³¹ Case C-370/05, *Festersen* [2007] ECR I-1129.

³² Consistent case law, eg Case 152/73, *Sotgiu* [1974] ECR 153; Case 33/74, *van Binsbergen* [1974] ECR 1299; and Case C-111/91, *Commission v Luxembourg* [1993] ECR I-817.

³³ In the case of the free movement of services, residence requirements are the 'very negation' of the freedom granted by the Treaty (see Case 205/84, *Commission v Germany* [1986] ECR 3755) and so are even more difficult to justify.

move provided therein refers to intra-state movement and not inter-state movement, and that, in any event, one would think, the right to move in Community law goes far beyond the rights granted by the above-mentioned Protocol.

This case law signals a much more interventionist approach and as such demonstrates a willingness on behalf of the court to engage with the fundamental rights discourse beyond what might be seen as required by the demands of the internal market. What is relevant from a constitutional law perspective is that, as a result of this centralising tendency, national courts are pre-empted in carrying out their own (national) fundamental rights assessment. However, and as mentioned above, this step is still constitutionally justified in that fundamental rights and Treaty freedoms concur in affording the most extensive protection to the individual, albeit at the expense of national regulatory autonomy.

C. The Third Line of Case Law: Fundamental Rights to Justify a Restriction to the Free Movement Provisions

A slightly different scenario occurs when the Member State relies on the need to protect fundamental rights, as guaranteed by national law, to justify a restriction to the free movement provisions. This possibility, already evident in *Familiapress*, was fully explored in *Omega*.³⁴ In that case, Germany sought to justify the prohibition on games mimicking the killing of people by relying on the need to protect human dignity as a value enshrined in the German Constitution. The court accepted that the protection of a constitutionally enshrined value could fall within the scope of the public policy derogation. In this respect, the court clarified that, in order to assess the proportionality and the necessity of the rules at issue, '[i]t is not indispensable ... for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected'.³⁵ In *Omega*, it

³⁴ Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

³⁵ *Omega*, para 37.

is made clear that the Community free movement provisions will not (necessarily) force upon Member States a ‘levelling’ down of fundamental rights protection. In other words, there is space for a departure from a minimum standard of fundamental rights. The standard in fundamental rights is supervised by the European Court of Justice, but is still left to the discretion of Member States. In this respect, the centralising effect is minimal, relating simply to a supervisory role of the court, and the ‘federalising’ tendency appears predominant. This said, there is a fourth line of case law which, while at first sight appearing similar to the *Omega* case law, is more problematic.

IV. Assessing Conflict of Rights

The fourth, and in my opinion more complex development, is that relating to the *Schmidberger* case law.³⁶

A. The Ruling in *Schmidberger*

It might be recalled that the *Schmidberger* case arose as a result of a previous ruling of the court. In *Commission v France*,³⁷ the court held that Member States could be in breach of their Treaty obligations if they fail to actively protect enjoyment of the Treaty rights. In *Schmidberger*, an environmental group staged a demonstration on the Brenner motorway to protest against a planned expansion of the motorway. Schmidberger, an international transport company, brought proceedings to claim *Francovich* damages against the Austrian authorities on the grounds that, by allowing the demonstration to proceed, they had failed to protect the claimant’s rights under Article 28 EC. The court held that the failure to prevent the demonstration was to be qualified as a measure having equivalent effect to a quantitative restriction on

³⁶ Case C-112/00, *Schmidberger* [2003] ECR I-5659.

³⁷ Case C-265/95, *Commission v France* [1997] ECR I-6959.

imports; and that it was justified having regard to the fundamental right of freedom of expression. At this point, it is useful to quote directly from the court's judgment:

77. The case thus raises the question of the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty and, more particularly, the *question of the respective scope* of freedom of expression and freedom of assembly, guaranteed by Articles 10 and 11 of the ECHR, and of the free movement of goods, where the former are relied upon as justification for a restriction of the latter.

78. First, whilst the free movement of goods constitutes one of the fundamental principles in the scheme of the Treaty, it may, in certain circumstances, be subject to restrictions for the reasons laid down in Article 36 [now 30] of that Treaty or for overriding requirements relating to the public interest ...

79. Second, whilst the fundamental rights at issue in the main proceedings are expressly recognised by the ECHR and constitute the fundamental pillars of a democratic society, it nevertheless follows from the express wording of paragraph 2 of Articles 10 and 11 of the Convention that freedom of expression and freedom of assembly are also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under those provisions and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued ...

80. Thus, unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose. Consequently, *the exercise of those rights may be restricted*, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed ...

81. In those circumstances, the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a *fair balance was struck between those interests*.

82. The competent authorities enjoy a wide margin of discretion in that regard. Nevertheless, it is necessary to *determine whether the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights*.

...

91. An action of that type usually entails inconvenience for non-participants, in particular as regards free movement, but the inconvenience may in principle be *tolerated* provided that the objective pursued is essentially the public and lawful demonstration of an opinion [emphasis added throughout].

At first sight, the *Schmidberger* ruling might appear both inoffensive and balanced. After all, the end result is exactly what one might have expected and desired. And yet, the case signals a move towards centralisation which is qualitatively different and greater, since the effect of the court's interpretation is that of conferring upon itself

the hermeneutic monopoly over the possible clash between a fundamental (non-economic) right and a Treaty right. Here, consider that there is a substantial difference between this case and *Omega*. In the latter, what was at stake was a *rule* which, while aimed at the protection of fundamental rights, also directly restricted the enjoyment of one of the Treaty freedoms. In *Schmidberger*, on the other hand, what is at stake is not a direct barrier imposed by the state, but rather the failure of the state to curtail a fundamental right.

In the writer's opinion, the effect of the court's choice to define the legitimate exercise of fundamental rights as a barrier to Community movement is conceptually problematic. In particular, the following issues deserve closer attention.

First, even though the court accepts that fundamental rights might prevail *even* over the Treaty rights, it seems to put the two on the same level. As a result, the language used by the court is resonant of that used in relation to a clash of fundamental rights. And yet, one should be careful in accepting this premise as one which can be constitutionally justified. The Treaty rights might well be 'fundamental' to the achievement of European integration, and they might well be very important to Union citizens, but they are radically and qualitatively different from fundamental human rights recognised by the European Convention or in bills of rights across Europe. The Treaty rights are instrumental to the achievement of a political project; and they are rights which derive from a Treaty. Those rights would not, and do not, exist outside the Treaty providing for them. Furthermore, the constituency of right-holders is limited not only through the requirement of nationality; but also because those (Treaty) 'fundamental rights' are conditional upon movement and, in cases of mobility which is less transient in nature, also upon the satisfaction of given economic prerequisites, be those economic activity or economic independence.³⁸

Fundamental rights, on the other hand, are those that we recognise, if not altogether inherent to, at least as being at the very core of our understanding of humanity. These rights do not necessarily need to be codified and are available to any person,

³⁸ Ie for stays of more than three months: see Art 7 Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L229/35.

regardless of nationality or wealth. They are not ‘granted’ by a legal document, but rather *recognised* in legal documents.³⁹ Without entering into the debate about the true nature of fundamental rights, this understanding of some rights as ‘fundamental’ is evident in the Union’s own Charter of Fundamental Rights, which does not ‘create’ rights, but simply makes them more visible, and which recognises that some rights are available regardless of possessing Union citizenship.⁴⁰

The use of the same terminology, that of fundamental rights, to identify two radically different types of rights is thus debatable; it suggests a homogeneity which is not conceptually sound and might lead to the classification of those ‘spurious’ conflicts of rights as *true* clashes of fundamental rights.⁴¹ And this erroneous classification is not simply a matter of terminology: rather, it might deceive as to the respective strength of competing claims; and as to the hermeneutic path that the interpreter should take in order to solve instances of conflict.

Secondly, the language of the court very much reflects this error in classification, leading to another flaw in the way in which the fundamental rights discourse is articulated in the jurisprudence. In *Schmidberger*, the court found that the failure of the Austrian authorities to ban the demonstration which led to an interruption in the Brenner motorway was to be qualified as a measure having equivalent effect; it therefore had to be ‘objectively’ justified.⁴² The court then held that:

³⁹ This is certainly true for the European Community or else it would have been impossible for the court to develop its general principles case law.

⁴⁰ We shall not enter into the debate as to whether the drafters’ intention of avoiding a hierarchy of rights in the Charter has been fulfilled; in any event the scope of the rights in the Charter, and therefore the extent to which they can be protected, varies considerably from right to right. In this respect, consider also the distinction between ‘principles’ and ‘rights’ as drawn in Art 52(5) Charter (2007 version).

⁴¹ On spurious conflicts, see L Zucca, *Constitutional Dilemmas. Conflict of Fundamental Legal Rights in Europe and the USA* (Oxford, Oxford University Press, 2007) and ‘Conflicts of Rights as Constitutional Dilemmas’ in E Brems (ed), *Conflicts between fundamental rights* (Antwerp/Oxford, Intersentia, 2008) 19. See further below.

⁴² Case C-112/00, above n 36, para 64.

... since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a *legitimate interest* which, in principle, justifies a restriction of the obligations imposed by Community law, *even under* a fundamental freedom guaranteed by the Treaty such as the free movement of goods.⁴³

The problem with this line of reasoning is that it suggests the demotion of fundamental rights from ‘individual’ rights to public policy reasons; from fundamental rights to legitimate *interests*, albeit interests which might prevail *even* over the free movement of goods. Furthermore, while at first sight it might seem that the court either altogether rejects a hierarchy of rights; or privileges fundamental rights over Treaty rights, its analysis leads to the opposite conclusion, giving the impression of a hierarchical superiority of the Treaty rights over fundamental rights. The stress is, in fact, on the limitation of the right to move in Community law: freedom of expression is nothing but a limitation to this right which *might* (or might not) be legitimate.

The rest of the *Schmidberger* ruling confirms this reversal of priorities: thus, the Member State is called upon to justify the fact that it has *not* restricted a fundamental right. Since the right to freedom of expression can be restricted, the Member State might be under a Community law duty to do so. Whilst it is clear that there is no conflict of duties between Convention and Treaty, and that the Convention rights might sometimes be reinforced, since their breach might also constitute a breach of Community law, the *Schimidberger* ruling implies a positive duty to use the margin of appreciation recognised by the European Court of Human Rights so as to limit rights conferred by the Convention. The soundness of this interpretation might well be doubted, especially having regard to the fact that the Convention only recognises a basic floor of rights; and that the very idea of the margin of appreciation, and its use in relation (in particular) to the freedom of expression, has been heavily criticised.⁴⁴

The fallacious premise which laid the foundation for the court’s reasoning—that of the homogeneity between Treaty rights and fundamental rights—then leads it to reverse the fundamental rights discourse. Fundamental rights are transformed from

⁴³ *Ibid*, para 74 (emphasis added).

⁴⁴ For an account, see J Sweeney, ‘A “Margin of Appreciation” in the internal market: lessons from the European Court of Human Rights’ (2007) 34 *Legal Issues of Economic Integration* 27.

individual rights to a ‘legitimate interest’, to public policy reasons; and the Treaty rights become a vehicle to impose upon Member States a restrictive approach to fundamental rights, so that the margin of appreciation is transformed from an instrument, however debatable, which acknowledges some pluralism in our understanding of the precise content of fundamental rights, into a useful tool to enforce the primacy of Treaty rights. Furthermore, this mode of reasoning determines two important consequences: first of all, it allows the court to claim a hermeneutic monopoly over the way in which conflicts between economic Treaty rights and fundamental rights are determined; secondly, and perhaps more importantly, it deprives the interpreter of any useful framework to assess how these conflicts should be solved, which in turn might lead to a loss of legitimacy once a decision has been taken. We shall now turn to the two cases that brought these problems into greater light.

B. The Rulings in *Viking* and *Laval*

The *Schmidberger* case was an easy one: it was unsurprising that the court indicated that the Austrian authorities had not failed in their duties under Community law in allowing the demonstration to take place. And yet, as we have seen in the previous section, the reasoning of the court was conceptually flawed.

Those flaws were, in the eyes of many commentators,⁴⁵ fully exposed in two subsequent cases that dealt with the conflict between Treaty rights and fundamental rights. In both cases, the issue at stake related to the extent to which the exercise of collective action could be construed as a barrier to the free movement rights. In *Viking*, the trade unions engaged in transnational collective action to prevent the

⁴⁵ See, eg C Barnard, ‘Social Dumping or Dumping Socialism?’ (2008) 67 *CLJ* 262, as well as her contribution to this volume; P Sirpis and T Novitz ‘Economic and social rights in conflict: political and judicial approaches to their reconciliation’ (2008) 33 *EL Rev* 411; and ACL Davies ‘One step forward, two steps back? The *Viking* and *Laval* cases in the ECJ’ (2008) 37 *ILJ* 126.

flagging of convenience of a ship⁴⁶; in *Laval*, coordinated collective action was taken in order to enforce local working conditions against a company which used foreign workers as posted workers.⁴⁷ The legal situation in those cases was slightly different from that at issue in *Schmidberger* in that, in the latter, the case arose as a result of a *Francovich* action taken against the state for its failure to protect the Treaty rights of the claimant, while in *Viking* and *Laval*, the Treaty was invoked directly by private parties against the trade unions.

Notwithstanding this difference, however, the starting premise of the *Viking* and *Laval* rulings is the same as that in *Schmidberger*: the protection of fundamental rights is a *legitimate interest* which must be ‘reconciled with the requirements relating to the rights protected under the Treaty and in accordance with the principle of proportionality’.⁴⁸ The stress in favour of Treaty rights is even more pronounced in *Viking* and *Laval* than it was in *Schmidberger*: it is the exercise of the fundamental right that must be proportionate. Thus, the traditional fundamental rights assessment is rebutted: rather than construing the exercise of a Treaty right as a possible interference with a fundamental right, an interference that would have to be proportionate according to the case law of the European Court of Human Rights, it is the exercise of the fundamental right that is construed as an interference with a (more) fundamental Treaty right and that must therefore be proportionate.

The consequences are far reaching and clearly visible in both cases. First of all, the assessment of the respective strengths between competing interests is centralised in the hands of the European Court of Justice.

Secondly, in both cases, the trade unions see imposed upon them a duty not to interfere with the Treaty rights of the economic operators. This fact further strengthens the Treaty right in comparison to the fundamental right, which is not horizontal unless national legislation provides for a duty upon the social partners to

⁴⁶ Case C-438/05, *The International Workers’ Federation and the Finnish Seamen’s Union v Viking Line* (judgment of 11 December 2007).

⁴⁷ Case C-341/05, *Laval un Partneri* (judgment of 18 December 2007). See also C Barnard’s contribution in this volume.

⁴⁸ *Viking*, para 46 (emphasis added).

respect it; and, as noted by Giubboni, imposes upon the trade unions the duty to take into consideration not only the interests of the parties they represent, but also the interest of the counterparties they are acting against.⁴⁹ In this way, the very nature of collective action as a means to solve a labour *dispute* is deprived of its very *raison d'être*.

Thirdly, as a result, the conditions that determine the legitimate exercise of collective action are subsumed within the hermeneutic monopoly of the court and are subtracted from negotiation between the different stake-holders. The social partners then lose a 'voice' in the collective process that determines the acceptable limits of the right to take collective action, on the one hand, and the duty to respect some predefined rules of the game that have been negotiated with the other social partners.

Fourthly, the trade unions might face financial liability for the (otherwise legitimate) exercise of a fundamental right.

The consequences of the *Viking* and *Laval* rulings are then far-reaching and deeply affect the balance of power between social parties. In this respect, those rulings exemplify the problems inherent in the premises from which the court starts. Leaving aside the peculiarities of those cases, however, the court's approach raises more general problems in relation to the centralisation of fundamental rights scrutiny, to which we shall now turn.

V. Centralisation and its Problems

⁴⁹ Paper (unpublished) presented as the Modern Law Review workshop 'Developing Solidarity in the EU: Citizenship, Governance and New Constitutional Paradigms' held at the University of Sussex (5 May 2008).

The fundamental rights rhetoric endorsed by the court in the early 1970s undoubtedly contributed to the legitimisation of the Communities/Union⁵⁰; and such legitimising function would have been impossible without a degree of centralisation.

In relation to Union acts, and given the principle of supremacy as well as the *Foto-Frost* doctrine,⁵¹ centralisation is not only desirable, but also essential to the Union's own functioning.⁵² An act of the Union must be assessed in relation to the Union's own constitutional system. If a Union act is deemed unlawful, such an act must be void across the entire territory of the Union. In this respect, a limited degree of differentiation in fundamental rights protection is inevitable: the Union fundamental rights standard might be sometimes lower, and sometimes higher, than that which would be enforced at national level. Yet, given that, in any event, it cannot fall below the ECHR standard,⁵³ such oscillations are acceptable within the Union system.⁵⁴

⁵⁰ See N Walker, 'Human Rights in a Postnational Order: Reconciling Political and Constitutional Pluralism' in Campbell, Ewing and Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford, Oxford University Press, 2001) 119.

⁵¹ Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

⁵² Although it is open to debate whether the *Foto-Frost* doctrine applies to third pillar acts where the court's jurisdiction is reduced. Against the applicability of *Foto-Frost* to this area, see A Arnall, 'Taming the Beast? The Treaty of Amsterdam and the Court of Justice' in D O'Keeffe and P Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Hart Publishing, Oxford, 1999) 109; and 'The Rule of Law in the European Union' in A Arnall and D Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford, Oxford University Press, 2002) 239. In favour, see E Spaventa, 'Remembrance of Principles Lost: on Fundamental Rights, the Third Pillar and the Scope of Union Law' (2006) 25 *Yearbook of European Law* 153.

⁵³ Which of course does not mean that it never falls below the ECHR standard: consider, eg the problems with the limited jurisdiction of the European Court of Justice in relation to the third pillar; or compare the ECJ's rather conservative approach in Joined Cases C-122 & 125/99, *D and Sweden v Council* [2001] ECR I-4319 with the ECtHR ruling in *Salgueiro da Silva Mouta v Portugal* (Application No 33290/96; judgment of 21 December 1999).

⁵⁴ See also the German Constitutional Law Court's ruling in the so-called *Solange 2* ruling [1987] 3 CMLR 225.

In relation to national law limiting or derogating from a Treaty right, centralisation is also not problematic from a fundamental rights perspective⁵⁵: in those cases, fundamental rights and Treaty rights concur in affording the maximum level of protection to the individual. As mentioned above, in cases where the Member State is exercising a discretion when implementing Community law, the standard of fundamental rights protection is the highest between that set by national law and that set by Community law. In those situations in which the Member State is derogating or limiting a Treaty right, Community law fundamental rights are relevant only insofar as they afford more protection to the individual, either because the standard is higher or because of the better protection afforded by the immediate and direct applicability of Community law. Furthermore, it appears that, in such cases, the margin of appreciation left by the European Court of Justice to national authorities is narrower than that that would be accepted in the more diversified Convention system.⁵⁶ Finally, in those instances in which the Member State relies on fundamental rights in order to justify a limitation to a Treaty right, centralisation and federalisation appear balanced: subject to the supervisory role of the European Court of Justice (centralisation), the standard of fundamental rights protection is that chosen by the Member State (federalisation).⁵⁷

However, in those cases where a Treaty right directly clashes with the exercise of a fundamental right, we see a strong push towards centralisation—and such a step is constitutionally more problematic. We have mentioned above that the starting premise in these cases is that of an ontological equation between Treaty rights and fundamental rights which leads to the qualification of those instances as clashes of rights. Here, it should be considered that true clashes of rights are always difficult to assess. Zucca has argued that ‘genuine’ clashes of rights are not only difficult, but *impossible* to adjudicate: the process of adjudication between two competing rights of equal force, what he identifies as a *true* clash, is the result of value judgments made

⁵⁵ While of course it still raises questions as to the boundaries of Community law and state’s sovereignty.

⁵⁶ Eg it is open to debate whether the rules in *Carpenter* would have been found disproportionate by the European Court of Human Rights.

⁵⁷ Case C-36/02, above n 34.

by the adjudicator, be that a court or the legislature, which transcend the legal process.⁵⁸ In other words, the hermeneutic process does not help in finding a solution to true clashes of rights and, in those cases, the balancing exercise reflects the preferences of the adjudicator.

However, Zucca claims that true clashes of rights are much rarer than one might think. Rather, the majority of cases, those which he identifies as *spurious* clashes of rights, involve a clash between a right and a public interest. Here, the adjudicator might engage in a more fruitful balancing exercise, since the balancing exercise focuses on the very definition of the right at stake. Thus, hermeneutic principles and legal reasoning can perform their full function, very much in the same way as when the European Court of Justice is defining the scope of the Treaty freedom and the extent to which Member States can invoke a public interest to limit those freedoms.

The qualification of the clash between Treaty rights and fundamental freedoms as a clash of rights then distorts the perspective, leaving us in the dark as to the way in which the respective strengths of the competing claims should be assessed. Here, it is argued that a more correct classification might be helpful in the process of adjudication. This is not only important for the sake of national courts and legal clarity; it is also crucial in order to bestow legitimacy onto the entire process. Otherwise, adjudication might be seen as transcending the hermeneutic dimension and become instead a political exercise. Here, consider the following.

The ECJ approached the *Schmidberger*-type problem in the following way:

Treaty right (including interest in European integration) → fundamental right

Fundamental right → fundamental right

As a result of this approach, the outcome of the case will include weighing up also the interest in European integration (a Community public interest) against the competing

⁵⁸ L Zucca, *Constitutional Dilemmas. Conflict of Fundamental Legal Rights in Europe and the USA* (Oxford, Oxford University Press, 2007) and ‘Conflicts of Rights as Constitutional Dilemmas’ in E Brems (ed), *Conflicts between fundamental rights* (Antwerp/Oxford, Intersentia, 2008) 19.

non-integrating fundamental right. This way of reasoning is unsatisfactory since, first, it does not enlighten us as to the process of adjudication and, secondly, it introduces a non-fundamental right variable in the fundamental right discourse.

A more satisfactory way to look at this question might be:

Right to exercise an economic activity → fundamental right

European integration → Community public interest

Fundamental right → fundamental right

If we were to follow this route, the outcome of the case will depend only on the mutual strengths of the two fundamental rights in competition, and the public interest of the Community would be treated exactly for what it is, ie a public interest which might in certain cases legitimately be relied upon by the Community in order to restrict a competing non-economic fundamental right.

The way of articulating the legal problem will then determine two radically different results. A theoretical example might serve to illustrate the difference. Let us consider a true clash of rights, ie a case where the conflicting claims are absolutely mutually exclusive so that the enjoyment of the right by an individual determines the loss of that same right by another. Take for instance the case of Ms Evans,⁵⁹ where the European Court of Human Rights had to determine whether Ms Evans' right to use her fertilised eggs, her only eggs that were available to her following treatment for cancer, clashed with her ex-husband's right to withdraw consent to the use of his genetic material. Now, and regardless of the merits of the case,⁶⁰ would it be intellectually defensible to say that, if the procedure for implant was to take place in another Member State, Mrs Evans' right to move and receive services should have been taken into consideration as (another) fundamental right to strengthen her claim?

⁵⁹ *Evans v UK* (Application No 6339/05; judgment of 10 April 2007); also analysed by Zucca, n 38 above.

⁶⁰ For a reasoned critique, see R Thornton, 'European Court of Human Rights: Consent to IVF Treatment' (2008) 6 *International Journal of Constitutional Law* 317.

If we were to accept the court's reasoning in *Schmidberger*, then the answer would have to be positive. However, if we properly qualify the clash of rights as being a clash between Article 8 ECHR rights, the fact that Ms Evans were (or were not) to move would be irrelevant. Similarly, and as said before, in *Viking* and *Laval*, the competing claims were between the workers' rights to take collective action (either as part of their freedom of expression and association or as a free standing right)⁶¹ and the employers' rights to pursue their trade or business (as part of their right to property). The Community dimension should have been relevant only in imposing upon the national authorities, or legislature, a duty not to discriminate between intra-Community and domestic situations, not in assessing the mutual strengths of the rights at issue.

Take for instance the case in which the political situation in another Member State attracts criticism of a human rights group elsewhere in the EU, and the latter group calls for a successful boycott of that Member State's products. Should the actions of the group, legal in the country where they took place, be called into question because they have an effect on intra-Community trade? Should the human rights group have due regard to the Treaty freedoms when organising a boycott? After all, their actions might lead to as severe consequences as those faced by the businesses in *Viking* and *Laval*. And what should we make of a strike that stops production and therefore exports? Is this the way we are going to assess the strengths of competing claims?

Furthermore, the different way of articulating the legal problem might also produce a different jurisdictional result. If the clash is between fundamental rights, regardless of the Community dimension, then the role of the European Court of Justice should be limited to a supervisory role, *Omega*-style, aimed at ensuring that claims containing a Community element are not treated in a different and more disadvantageous way than their purely domestic counterparts. However, if the clash is seen as a clash between a Community 'fundamental right' (ie the Treaty freedom) and another fundamental

⁶¹ The former would be the ECHR route, since there is no free-standing right to strike in the Convention; the latter might be the route to take following the rulings in *Viking* and *Laval*, since the court held that the right to strike is a fundamental right recognised by the general principles of Community law (and by Art 28 of the EU Charter of Fundamental Rights). See also C Barnard, 'Social Dumping or Dumping Socialism?' (2008) 67 *CLJ* 262.

right, *Schmidberger/Viking* style, then the role of the European Court of Justice will be predominant and the latter will gain a monopoly in assessing the mutual strengths of the conflicting claims.

The way in which we choose to articulate a legal problem is of paramount importance, not only because it might determine the outcome of the case, but because it ensures the legitimacy of the adjudicating process. While it might be naive to believe that adjudication occurs in a political vacuum, the adjudicator cannot be seen as forcing his or her own societal/economic/ideological preferences as a matter of course. If the hermeneutic premises are faulty, the process of adjudication will be not only faulty, but will risk being de-legitimised. Cases involving clashes of fundamental rights are probably the most difficult to solve and surely the most controversial. However, when a court, be it national or supranational, fails to articulate its own discourse, it risks being accused of moving into a realm that it does not pertain to it, that of pure politics. Furthermore, if the legal reasoning is not articulated, it is impossible to predict.

VI. Conclusions

The development of a fundamental rights discourse in the European Union has undoubtedly strengthened the Union's constitutional foundations as well as its democratic credentials. This discourse has been embraced by all of the institutional actors at European level: if national court and European Court of Justice have provided the original impetus, the political institutions have been more than ready to provide their own contribution to the development of a fundamental rights discourse in the EU. However, the process through which the fundamental rights rhetoric is developed is far from being linear: rather, it reflects the Union's own constitutional idiosyncrasies. In this respect, the articulation of the fundamental rights discourse at the political level might appear rather schizophrenic, with different forces pulling in opposite directions. These opposing forces are visible also in the case law of the European Court of Justice, albeit, naturally, the centralising force has been predominant in the court's discourse. While this centralisation is fully justified in relation to most of the case law, to either ensure the proper functioning of the Union

or the protection of individuals, in cases involving a clash of rights, such a centralising approach is more debatable. In this case, centralisation is the result of a false premise, that of an ontological homogeneity between Treaty rights and fundamental rights. This false premise determines both the artificial strengthening of some claims vis-a-vis others, solely because of the existence of a cross-border element, and also the imposition of the court's hermeneutic monopoly. Furthermore, the fallacious starting point determines the impossibility of ascertaining the reasons behind the adjudicating process. However, once the legal discourse is articulated in a different way, so that the competing fundamental rights are properly identified, it is possible to correct these distortions and to ensure a hermeneutically consistent system. And once the competing claims are identified for what they are, and the Community interest is properly identified as no more than a public interest, the process of adjudication becomes more transparent, as well as being properly relocated in the hands of the national judiciary. After all, centralisation is not always the answer.